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UNITED PLUMBING AND SANITATION SDN BHD v. TAMAN RATU SDN BHD & ANOTHER CASE

HIGH COURT MALAYA, PULAU PINANG
ANAND PONNUDURAI J
[CIVIL SUIT NOS: PA-22NCVC-8-01-2022
& PA-22NCVC-9-01-2022]
4 JUNE 2024

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Abstract – *It is a precondition for an order of damages in lieu of specific performance of a contract that specific performance is an available remedy in the first place. Where specific performance is available, it is up to the court to decide whether or not it ought to grant specific performance or exercise its discretion to grant damages in lieu of specific performance. On the contrary, if specific performance is not available, then damages cannot be awarded in lieu thereof.*

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CONTRACT: *Agreement – Sale and purchase agreement ('SPAs') – Failure to deliver vacant possession due to occurrence of landslide – Whether claimants entitled to specific performance of SPAs or alternatively damages in lieu of specific performance – Whether developer abandoned project – Whether claimant entitled to liquidated damages – Whether premature – Whether landslide constituted force majeure*

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CONTRACT: *Specific performance – Sale and purchase agreement ('SPAs') – Failure to deliver vacant possession due to occurrence of landslide – Whether claimants entitled to specific performance of SPAs or alternatively damages in lieu of specific performance – Whether developer abandoned project – Whether claimant entitled to liquidated damages – Whether premature – Whether landslide constituted force majeure*

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These two claims were by two separate individual purchasers who purchased houses from the same developer defendant *via* different sale and purchase agreements ('SPAs') executed on different dates. Pursuant to the SPAs, the plaintiffs were supposed to receive vacant possession in 2014 and 2016, respectively, but the defendant failed to do so as per the agreements. In Suit 8, the parties executed a SPA in respect of Plot 17 which was based on sch. G sub-reg. 11(1) of the Housing Development (Control and Licensing) Regulations 1989 ('Regulations') ('Plot 17 SPA'). The purchase price of RM1,975,000 (after rebate of RM5000) was to be paid in instalments based on the stages and amounts as set out in the Third Schedule of Plot 17 SPA. The defendant had invoiced the plaintiff for the amounts payable and the plaintiff had paid the defendant a total sum of RM1,475,325.94. There was thus an outstanding sum of RM108, 674.06 and owing by the plaintiff to the defendant. In Suit 9, the parties executed a SPA in respect of Plot 18 based

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on sch. G sub-reg. 11(1) of the Regulations ('Plot 18 SPA'). The purchase price of RM1,980,000 (after discount of RM200,000) was to be paid by instalments based on the stages and amounts as set out in the Third Schedule of Plot 18 SPA. The defendant had invoiced the plaintiff for the amounts payable totalling RM1,544,000 and the plaintiff had paid the aforesaid sum to the defendant. The defendant contended that they had completed the construction of the development by 5 April 2017. However, the certificate of completion and compliance ('CCC') for the said development had not been issued at the material time. It was the defendant's case that they were in the course of applying for CCC for the development when a landslide induced by exceptionally heavy rain occurred on 5 November 2017, destroying the earth retaining wall structure, the road known as Persiaran Tanjung Bungah 3, which was built on top of the earth retaining wall structure and the drainage system which had been completed by the defendant. The landslide had also caused damage to the properties in the said development which were Plot 17 and Plot 18 respectively and other houses which had been completed at the material time. Due to the destruction brought by the landslide, the defendant contended that they were prevented from obtaining the CCC for the said development and delivering vacant possession of the properties to the plaintiffs. It was the defendant's defence that they did not abandon the said development after the landslide. The defendant took steps to apply to the local authority, Majlis Bandaraya Pulau Pinang ('MBPP'), for approval to reconstruct the damaged infrastructure and repair the damaged houses. The mitigation works plan involved the repair and reconstruction of the damage cause by the aforesaid landslide in several stages. MBPP approved the mitigation works plans based on the condition that the defendant was required to obtain approval under s. 19 of the Town & Country Planning Act 1976 to execute Stages 3 and 4 of the mitigation works plan ('mitigation planning permission'). The defendant was not permitted to commence Stages 3 and 4 of the mitigation works until the mitigation works planning permission has been approved as Stages 3 and 4 of the mitigation works plan involved a variation to the original layout plan/planning permission of the development granted by MBPP. Stages 1 and 2 of the mitigation works plan were completed. On 18 October 2022, MBPP approved the mitigation works planning permission and approved the commencement of earthworks in connection with Stages 3 and 4 of the mitigation works plan. The defendant intended to deliver vacant possession of the said properties to the plaintiffs once the defendant had completed Stages 3 and 4 of the mitigation works and obtained the CCC for the said development. The issues that arose were (i) whether the plaintiffs were entitled to specific performance of the SPAs; (ii) alternatively, damages *in lieu* of specific performance of the SPAs; (iii) whether the plaintiffs were entitled to liquidated damages; (iv) whether the landslide which occurred constituted a *force majeure* and a defence which was available to the defendants; and (v) whether the plaintiff's claim for

specific performance of the SPA was tantamount to compelling the defendant to contravene the conditions as contained in MBPP's letter and s. 19 of the Town & Country Planning Act 1976.

Held (dismissing plaintiffs' claim in both Suit 8 and 9):

(1) Due to the landslide, the defendant had to construct an elevated driveway pursuant to Stages 3 and 4 of the mitigation works plan to replace the earth retaining wall and road and drainage which were destroyed by the landslide without which the CCC could not be obtained and vacant possession of the completed properties could not be delivered to the plaintiffs. As such, the only part of the SPAs that had yet to be performed by the defendant was the re-construction of the infrastructure works under cl. 16 of the SPAs specifically Stages 3 and 4 of the mitigation work plan which were necessary for the obtaining of the CCC. The fact that the defendant had to apply to MBPP to vary the planning permission because of the landslide was well within the knowledge of the plaintiffs. The defendant had, since 1 March 2023, obtained the planning approval and approval for commencement of earthworks from MBPP to carry out Stages 3 and 4 of the mitigation works plan. From the chronology of events, the defendants could not be accused of abandoning the said project. On the contrary, the defendant did not abandon the said project after the occurrence of the landslide but had indeed taken all necessary steps to carry on the mitigation works to complete the project and to abide by the obligations under the SPAs and to endeavour to deliver vacant possession to the plaintiffs in due course. It was not a situation of the defendant refusing to perform the contract but rather a case of being prevented from doing so. (paras 70-75)

(2) There was no certificate issued nor publication of Gazette by the Minister of Housing and Local Government which certified that the licensed housing developer had abandoned the housing development pursuant to s. 11(ca) of the Housing Development (Control and Licensing) Act 1966. All reasonable actions and precautions had been taken to mitigate and solve the issues caused by the landslide. There was no basis for the plaintiffs' claim for specific performance of the SPAs. It is trite law that the court would not order specific performance where the performance of which would contravene the law as in this case. (paras 77 & 78)

(3) Once it was determined that specific performance was not an available remedy, then damages *in lieu* therefore could not be awarded. It therefore appeared that it was a precondition for an order of damages *in lieu* of specific performance that specific performance was an available remedy in the first place. In other words, where specific performance is available, it is up to the court to decide whether or not it ought to grant specific performance or exercise its discretion to grant damages *in lieu* of specific performance. On the contrary, if specific performance was

not available then damages could not be awarded *in lieu* thereof. Thus, the plaintiffs' claim for specific performance and its alternative remedy of damages *in lieu* of specific performance was unsustainable and unmeritorious. (paras 81 & 88)

(4) Based on the express words in cl. 22(3) of the SPAs, it was clear that the plaintiffs' entitlement to liquidated damages did not accrue until the date of the delivery of vacant possession of the said properties which had yet to be given in this present case. In this regard and in any event, the plaintiffs' claim for LAD was premature and only accrued once vacant possession is given. Stages 3 and 4 of the mitigation works were underway and the plaintiffs may thereafter proceed to commence any proceedings for LAD once vacant possession is given pursuant to cl. 22 of the SPA. There was no necessity to make any declaration relating to LAD. (paras 91-93)

(5) There was no necessity to make any ruling on whether the landslide amounted to *force majeure etc*, as that issue would be one that the defendant may at the appropriate time subsequently ventilate and rely on to defend any future possible claims for LAD by the plaintiffs. In any event, whether the defendant was in the midst of applying CCC or not made no difference in the present case as that ought to be ventilated in any claim for LAD. (paras 94 & 95)

Case(s) referred to:

Albert Lim Kok Heng & Anor v. Taman Ratu Sdn Bhd (Suit No: PA-22NCVC-161-07-2019) (Unreported) ***(refd)***

Balbeer Singh Karam Singh & Ors v. Sentul Raya Sdn Bhd [2014] 7 CLJ 461 CA ***(refd)***

Bosaid v. Andry [1963] VLR 465 ***(refd)***

Kwan Sun Ming v. Chak Chee Hing [1964] CLJU 70; [1964] 1 LNS 70 FC ***(refd)***

Lavery v. Pursell [1888] 39 Ch D 508 ***(refd)***

Million Westlink Sdn Bhd & Anor v. Maybank Investment Bank Bhd & Ors And Other Appeals [2018] 3 CLJ 315 CA ***(refd)***

Pasumarti Ramulu v. Nuthi Anantha Ramulu 1963 Indlaw, AIR 1966 AP 70 ***(refd)***

Legislation referred to:

Housing Development (Control and Licensing) Act 1966, s. 11(ca)

Housing Development (Control and Licensing) Regulations 1989, Schedule G reg. 11(1)

Rules of Court 2012, O. 33

Specific Relief Act 1950, s. 18

Town and Country Planning Act 1976, s. 19

For the plaintiffs - Malkit Singh; M/s Malkit Singh Randhawa Baidura & Co

For the defendant - Lim Hock Siang & Daniel Khoo Kelvin; M/s Presgrave & Matthews

Reported by Suhainah Wahiduddin

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JUDGMENT

Anand Ponnudurai J:

Introduction

B **[1]** These two claims are by two separate individual purchasers who purchased houses from the same developer defendant *via* different sale and purchase agreements (hereinafter referred to as "SPAs") executed on different dates.

C **[2]** As the plaintiffs were represented by the same set of solicitors and the defendants are the same and represented by the same set of solicitors, Suit No. PA-22NCVC-9-01/2022 (hereinafter referred to as "Suit No. 9") was transferred to be heard together with Suit No. PA-22NCVC-8-01/2022 (hereinafter referred to as "Suit No. 8"). There is no dispute that pursuant to the SPAs, the plaintiffs were supposed to receive vacant possession in 2014 and 2016 respectively, but the defendant had failed to do so as per the D agreements. However, the main defence of the defendant is that a landslide had occurred on 5 November 2017 and this has prevented them from delivering the said properties to the plaintiffs to date.

E **[3]** The plaintiffs' claims are essentially for specific performance of the SPAs or alternatively damages *in lieu* of specific performance. The plaintiffs have also sought a declaration that they are entitled to liquidated ascertained damages (hereinafter referred to as "LAD") and consequently sought various sums as per their calculations and also sought general damages.

F **[4]** However, the plaintiffs have subsequently withdrawn their prayers for LAD and general damages. In fact, the plaintiffs have, at para. 12 of their written submissions, agreed that the main issue in this case is whether or not the plaintiffs are entitled to specific performance of the SPAs or alternatively damages *in lieu* of specific performance.

G **[5]** This decision to some extent has been delayed by proceedings in a similar case which was decided earlier in a claim brought by a different plaintiff against the same defendant herein namely *Albert Lim Kok Heng & Anor v. Taman Ratu Sdn Bhd* in Suit No. PA-22NCVC-161-07-2019 (hereinafter referred to as "Suit No. 161").

H **[6]** In that case, there was no trial but a decision rendered by George Varughese JC on 28 October 2021 pursuant to O. 33 of the Rules of Court 2012. In that case, upon considering the facts which were almost identical to the ones at hand and also relate to the same terms and conditions under Schedule G of sub-reg. 11(1) of the Housing Development (Control and Licensing) Regulation 1989 and considering the case law and the I applicability of s. 18 of Specific Relief Act 1950, His Lordship essentially made the following observations and findings in that case:

(i) the obligations of the defendant in the SPAs to deliver vacant possession within 24 months was clear;

(ii) at para. 37, he found that it was not a case of the defendant refusing to perform the contract but were prevented to do so by the landslide and mitigation works underway;

(iii) at paras. 38 and 39, he then concludes that an order for specific performance would contravene the law; and

(iv) he however proceeds to order damages *in lieu* of specific performance.

[7] There is no disputing that the plaintiffs herein commenced these proceedings in 2022 placing heavy reliance on the above decision of *Albert Lim* (*supra*) in Suit No. 161 with the same set of counsel here.

[8] The defendant maintained their defence and was of the view that the decision of George Varughese JC was erroneous and which was pending appeal. Notwithstanding such appeal, a trial was conducted in January 2023 for both suits with each party calling two witnesses.

[9] During trial, the professional engineer, Mr Srinivasan testified as SD2 whereby it was clear that the defendant have proceeded with mitigation works which encompass four stages with the first and second stages being completed and having applied for Stages 3 and 4 in October 2023, they were still waiting for approval.

[10] Upon conclusion of trial, I allowed a further document to be added with the consent of the parties which revealed that the MBPP have approved the commencement of the earth works for Stages 3 and 4.

[11] As such, whilst we have yet to ascertain when exactly vacant possession can and will be handed to the plaintiffs, it is clear that the work for both Stages 3 and 4 of mitigation works are currently underway.

[12] However, upon initial written submissions having been filed, it transpired that the Court of Appeal had on 2 October 2023 allowed the defendant's appeal and set aside the entire decision of the High Court in Suit No. 161.

[13] It is pertinent to set out the unanimous decision of the Court of Appeal which reads as follows:

> Keputusan:
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> Court:
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> **Unanimous decision**
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> 2. The main issue is *whether the [plaintiffs] are entitled to Specific Performance (SP), or alternatively damages in lieu of specific performance of the Sale and Purchase Agreement (SPA).*

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3. *The learned Judicial Commissioner has made a finding in para 38 Grounds that an order for specific performance of the SPA will be tantamount to compelling the [defendant] to carry out Stages 3 &4 of the mitigation works in breach of section 19, Town &Country Planning Act 1976.*

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4. *In para (39), the learned JC then made a finding that it is trite law that the courts will not order specific performance of a contract if the performance of which would contravene an express provision of the law or an illegality.*

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5. *Therefore, we are of the considered opinion that since the learned JC has held SP cannot be ordered since the performance of which would contravene the law, we agree with the [defendant] that the [plaintiffs] are therefore not entitled to damages in lieu of specific performance since the [plaintiffs] have no legal right to the specific performance.*

6. This is also not a claim for damages for breach of contract but damages *in lieu* of SP.

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7. *We therefore find that the learned Judge has erred in law that requires appellate intervention. The appeal is allowed and the decision of the JC set aside.*

(emphasis added)

[14] From the above, it is clear that the decision of the Court of Appeal would in essence defeat the plaintiffs' claim herein as on the very same facts, this court cannot order specific performance and as such could/should not

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award damages *in lieu* of specific performance.

[15] Whilst the defendant then urged this court to determine the dispute based purely on the above decision of the Court of Appeal, I decided not to do so but to await the outcome of the plaintiff's (Albert Lim's) leave application to appeal to the Federal Court. However, leave was not granted

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on 19 February 2024 and as such, I allowed parties one final submission before deciding on this case.

[16] With the above background, I will delve a bit more into the facts of this case and my analysis/decision.

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Background Facts

[17] The defendant in their written submission has helpfully provided the factual background facts in respect of both cases which can be summarised as follows.

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The SPA In Suit No. 8

[18] The parties executed a SPA on 22 December 2014 in respect of Plot 17 which is based on Schedule G sub-reg. 11(1) of the Housing Development (Control and Licensing) Regulations 1989 (hereinafter referred to as "Plot 17 SPA").

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[19] The purchase price was RM1,975,000 (after rebate of RM5,000). The purchase price is to be paid in instalments based on the stages and amounts as set out in the Third Schedule of Plot 17 SPA.

[20] The architect has certified the stages of completion as stated in paras. 1 and 2 (a) to (h) of the Third Schedule of Plot 17 SPA pursuant to the following certificates:

No.	Stage of Completion	Date of Architect Certificates
a.	2 (a)	15.03.2016
b.	2 (b)	19.08.2016
c.	2 (c)	24.10.2016
d.	2 (d)	
e.	2 (e)	06.03.2017
f.	2 (f)	24.06.2016
g.	2 (g)	18.10.2016
h.	2 (h)	05.04.2017

[21] The defendant has invoiced the plaintiff for the amounts payable as stated in paras. 1 and 2 (a) to (h) of the Third Schedule of the SPA totalling RM1,584,000 as follows:

No.	Stage of Completion	Date of Notice of Completion
a.	2 (a)	17.03.2016
b.	2 (b)	22.08.2016
c.	2 (c)	25.10.2016
d.	2 (d)	
e.	2 (e)	20.2.2017
f.	2 (f)	24.06.2016
g.	2 (g)	18.10.2016
h.	2 (h)	05.04.2017

[22] The plaintiff has paid the defendant a total sum of RM1,475,325.94.

[23] There is thus an outstanding sum of RM108,674.06 due and owing by the plaintiff to the defendant which comprised of the following:

(i) the balance sum of RM9,674.06 out of total sum of RM99,000 invoiced to the plaintiff pursuant to architect certificate dated 5 April 2017 in respect of para. 2(g) of the Third Schedule of the SPA; and

(ii) the sum of RM99,000 invoiced to the plaintiff pursuant to architect certificate dated 5 April 2017 in respect of para. 2(h) of the Third Schedule of the SPA.

The SPA In Suit No. 9

[24] The parties executed SPA on 4 June 2012 in respect of Plot 18 based on Schedule G sub-regulation 11(1) of the Housing Development (Control and Licensing) Regulations 1989 (hereinafter referred to as "Plot 18 SPA").

[25] The purchase price is RM1,980,000 (after discount of RM200,000). The purchase price is to be paid by instalments based on the stages and amounts as set out in the Third Schedule of Plot 18 SPA.

[26] The architect has certified the stages of completion as stated in paras. 12(a) to (h) of the Third Schedule of the SPA pursuant to the following certificates:

No.	Stage of Completion	Date of Architect Certificates
a.	2 (a)	15.03.2016
b.	2 (b)	19.08.2016
c.	2 (c)	24.10.2016
d.	2 (d)	
e.	2 (e)	20.02.2017
f.	2 (f)	24.06.2016
g.	2 (g)	18.10.2016
h.	2 (h)	05.04.2017

[27] The defendant has invoiced the plaintiff for the amounts payable as stated in paras. 1 and 2(a) to (h) of the Third Schedule of Plot 18 SPA totalling RM1,544,000 and the plaintiff has paid the aforesaid sum to the defendant.

(hereinafter collectively referred to as "SPAs").

Completion Of The Development

[28] The defendant contends that they had completed the construction of the development by 5 April 2017. However, the certificate of completion and compliance (hereinafter referred to as "CCC") for the said development had not been issued at the material time.

The Destruction Caused By The Landslide On 5 November 2017

[29] On 5 November 2017, there was a landslide at the site after exceptionally heavy rain.

[30] It is the defendant's case that they were in the course of applying for CCC for the development when a landslide induced by exceptionally heavy rain occurred on 5 November 2017.

[31] The landslide destroyed the earth retaining wall structure, the road known as "Persiaran Tanjung Bungah 3" which was built on top of the earth retaining wall structure and the drainage system which have been completed by the defendant.

[32] The landslide had also caused damage to the properties in the said development (which are Lot 1296 (Plot 17) and Lot 1297 (Plot 18) respectively and four other houses which had been completed at the material time on 5 November 2017. The other four houses include Lot 1294 (Plot 15), Lot 1295 (Plot 16), Lot 1298 (Plot 19) and Lot 1299 (Plot 20), Mukim 17, Daerah Timur Laut, Pulau Pinang.

[33] The damage caused to the said properties due to the landslide can be seen in the photographs at pp. 75-78 of Bundle B.

[34] The aforesaid landslide was also reported in "The Star" newspaper report dated 7 November 2017 titled "Devastation Attracting Attention".

[35] The aforesaid landslide was allegedly caused by a rare weather phenomenon known as a cyclone which eventually resulted in "the worst flood on the island in 30 years" as reported in The Star newspaper article dated 8 November 2017 entitled "time for a cyclone warning system".

[36] Due to the destruction brought by the landslide, the defendant contends that they were prevented from obtaining the CCC for the said development and delivering vacant possession of the properties to the plaintiffs.

Amendment Of Original Layout Plan/Planning Permission Required By Local Authorities For Mitigation Works

[37] It is the defendant's defence that they did not abandon the said development after the landslide. The defendant took steps to apply to the local authority, Majlis Bandaraya Pulau Pinang (hereinafter referred to as "MBPP") for approval to reconstruct the damaged infrastructure and repair the damaged houses.

[38] The defendant had, through its consulting engineer, Messrs Sri & Sri's Associates Sdn Bhd (hereinafter referred to as "Sri & Sri") submitted a mitigation works plan to MBPP.

[39] The mitigation works plan involved the repair and reconstruction of the damage caused by the aforesaid landslide in four stages as follows:

STAGES	DETAILS
1	Involves the preparation of ground/site and rockfill to Finish Ground Level of 44.5 at an area as indicated in orange in the Layout for Mitigation Work plan.
2	Involves the stabilisation of slope with soil nailing and construction of retaining wall with micropile in front of Plot 15 - Plot 20 of the semi-detached houses.
3	Involves the stabilisation of ground below the elevated driveway to be constructed at the area outside the site boundary of the said Project. An elevated driveway will be built to replace the retaining wall and road which had collapsed.
4	Involves the making good of existing 1,800mm concrete drain.

[40] Pursuant to MBPP's letter dated 24 September 2018, MBPP had approved the mitigation works plan based on the conditions as contained therein.

[41] One of the conditions imposed by MBPP as contained in para. 5(iv) of MBPP letter dated 24 September 2018 is that the defendant is required to obtain approval as referred thereto under s. 19 of the Town & Country Planning Act 1976 to execute Stages 3 and 4 of the mitigation works plan (hereinafter referred to as "the mitigation planning permission").

[42] Paragraph 5(iv) of MBPP's letter dated 24 September 2018 states as follows:

> Untuk peringkat selanjutnya, **kelulusan pelan Kebenaran Merancang hendaklah diperolehi terlebih dahulu** termasuk kelulusan Laporan Geoteknikal oleh Jawatankuasa Pembangunan Tanah Berisiko Negeri Pulau Pinang sebelum sebarang kerja boleh dibenarkan untuk diteruskan. (emphasis added)

[43] It is clear that the defendant is not permitted to commence Stages 3 and 4 of the mitigation works until the mitigation works planning permission has been approved as Stages 3 and 4 of the mitigation works plan involved variation to the original layout plan/planning permission of the development granted by MBPP.

[44] Stages 1 and 2 of the mitigation works plan which were not subjected to the condition imposed under para. 5(iv) of the MBPP's letter dated 24 September 2018 have been completed.

[45] Since the defendant has transferred the ownership of "Persiaran Tanjung Bungah 3" to the State Authority, the application for mitigation works planning permission requires the consent and signature of the Pejabat Tanah dan Galian (hereinafter referred to as "PTG").

[46] Pursuant to PTG's letter dated 19 August 2020, PTG has consented to the application for mitigation works planning permission subject to conditions as imposed therein.

[47] The defendant's consulting engineer, Sri & Sri, forwarded the application for mitigation works planning permission to PTG for signature on 22 February 2021.

[48] On 3 May 2021, the defendant's consulting engineer, Sri & Sri submitted the application for mitigation works planning permission that was duly executed by PTG to Unit Urusetia Pusat Setempat (hereinafter referred to as "OSC") of MBPP for approval.

[49] MBPP, however, required the application for mitigation works planning permission to be executed by the purchasers of Lot 1295 (Plot 16), Lot 1298 (Plot 19) and Lot 1299 (Plot 20) as well since the defendant had transferred the ownership of the same to the purchasers.

[50] On 6 August 2021, the defendant had *vide* its consulting engineer, Sri & Sri requested the purchasers of Lot 1298 (Plot 19) to sign the application for mitigation works planning permission. The purchasers of Lot 1298 (Plot 19) however, refused to sign the application for mitigation works planning permission.

[51] MBPP subsequently decided to exclude Lot 1298 (Plot 19) from the application for mitigation works planning permission.

On 19 November 2021, the defendant had *vide* its consulting engineer, Sri & Sri submitted the application for mitigation works planning permission which excluded Lot 1298 (Plot 19) and duly executed by the owners of Lot 1295 (Plot 16), Lot 1299 (Plot 20), PTG and the defendant for approval by the OSC of MBPP.

[52] Pursuant to MBPP's letter dated 18 October 2022, the mitigation works planning permission was approved.

[53] Further, MBPP has recently *vide* its letter dated 1 March 2023 approved the commencement of earth works in connection with Stages 3 and 4 of the mitigation works plan.

[54] The defendant intends to deliver vacant possession of the said properties to the plaintiffs once the defendant has completed Stages 3 and 4 of the mitigation works and obtained the CCC for the said development.

Trial

[55] The trial was conducted over three days with the following witnesses testifying:

(a) the plaintiff's witnesses:

(i) Lau York Yip (SP1) in her capacity as the Director of the plaintiff in Suit No. 8;

(ii) Law Bee Bee (SP2) in her capacity as one of the purchasers in Suit No. 9 and a Director in a company called Optimus Excel Sdn Bhd.

(b) the defendant's witnesses:

(i) Tan Poh Poh (SD1) in her capacity as the Administrative Executive of the defendant;

(ii) Srinivasan a/l Muthu Palaniappa (SD2) in his capacity as a professional Engineer and the Managing Director of Sri & Sri Associates Sdn Bhd.

The Agreed Facts

[56] In Suit No. 8, the parties agreed to the following facts:

(i) that the parties have entered into a sale and purchase agreement dated 22 December 2014 (hereinafter referred to as "SPA") in respect of Plot 17 which is a three storey semi-detached house held under Geran No. Hakmilik 112323, Lot 1296, Mukim 17, Daerah Timur Laut, Negeri Pulau Pinang (hereinafter referred to as "the said property") agreed to be sold and erected by the defendant in the time and manner therein stated;

(ii) that the SPA is based on Schedule G of sub-reg. 11(1) of the Housing Development (Control and Licensing) Regulations 1989;

(iii) that the purchase price of the said property is RM 1,975,000 (after a rebate of RM5,000 for the omission of jacuzzi). The purchase price is to be paid in accordance with the stages and amounts as described in paras. 2(a) to (h) of the third Schedule of the SPA;

(iv) that as at the date of the writ, the defendant has invoiced the plaintiffs for the amounts payable as stated in paras. 1 and 2(a) to (h) of the third Schedule of the SPA totalling RM1,584,000;

(v) that the plaintiffs have paid the defendant a total sum of RM1,475,325.94 as at the date of this writ; and

(vi) that on 9 June 2020, the plaintiffs, *vide* their solicitors, Messrs Malkit Singh Randhawa Baidura & Co, issued a written notice to notify the defendant about its failure to deliver vacant possession of the said property within the time and manner stipulated in the SPA together with a claim for liquidated damages amounting to RM684,486.30 (calculated from 22 December 2016 to 8 June 2020 *ie*, for 1265 days and continuing). On 22 June 2020, the defendant through their solicitors, Messrs Presgrave & Matthews, replied to the aforesaid letter disputing the plaintiff's claim herein.

[57] In Suit No. 9, the parties agreed to the following facts:

(i) that the parties have entered into a sale and purchase agreement dated 4 June 2012 (hereinafter referred to as "SPA") in respect of Plot 18, a three storey semi-detached house held under Geran No. Hakmilik 112323, Lot 1297, Mukim 17, Daerah Timur Laut, Negeri Pulau Pinang (hereinafter referred to as "the said property") agreed to be sold and erected by the defendant in the time and manner therein stated;

(ii) that the SPA is based on Schedule G of sub-reg. 11(1) of the Housing Development (Control and Licensing) Regulations 1989;

(iii) that the purchase price of the said property is RM1,980,000 (after a discount of RM200,000). The purchase price is to be paid in accordance with the stages and amounts as described in paras. 2(a) to (h) of the Third Schedule of the SPA;

(iv) that as at the date of the writ, the defendant has invoiced the plaintiffs for the amounts payable as stated in paras. 1 and 2(a) to (h) of the Third Schedule of the SPA totalling RM1,544,000;

(v) that the plaintiffs have paid the defendant a total sum of RM1,544,000 as at the date of this writ; and

(vi) that on 6 July 2020, the plaintiffs *via* their solicitors, Messrs Malkit Singh Randhawa Baidura & Co, issued a written notice to notify the defendant about its failure to deliver vacant possession of the said property within the time and manner stipulated in the SPA together with a claim for liquidated damages amounting to RM941,205.47 (calculated from 4 June 2014 to 6 July 2020 *ie*, for 2214 days and continuing). On 14 July 2020, the defendant through their solicitors, Messrs Presgrave & Matthews, replied to the aforesaid letter disputing the plaintiff's claim herein.

The Issues To Be Tried

[58] The issues to be tried as agreed by parties are as follows:

(i) whether the plaintiffs are entitled to specific performance of the SPAs?

(ii) alternatively damages *in lieu* of specific performance of the SPAs?

(iii) further and/or in the alternative a declaration that the plaintiff is entitled to liquidated damages and to set off the amount due to the defendant (if any) from liquidated damages due from the defendant to the plaintiffs?

(iv) whether the landslide which occurred on 5 November 2017 constitutes a *force majeure* and a defence which is available to the defendants?

(v) whether the plaintiff's claim for specific performance of the SPA is tantamount to compelling the defendant to contravene the conditions as contained in MBPP's letter dated 24 September 2018 and s. 19 of the Town & Country Planning Act 1976?

The Parties' Submissions/Contentions

The Plaintiffs' Submissions/Contentions

[59] The plaintiffs' submissions/contentions as seen in their written submissions can be summarised as follows:

(i) that the defendant had failed to deliver the vacant possession to the plaintiffs within the prescribed period of 24 months pursuant to cl. 22(1) of the SPAs;

(ii) that the defendant is liable for the accrued liquidated damages pursuant to cl. 22(2) of the SPAs;

(iii) that the defendant had failed to deliver the vacant possession of the properties despite cl. 8 of the SPAs provides that "time shall be the essence of the contract in relation to all provisions of this agreement";

(iv) that the defendant was in fundamental breach of the SPAs and the plaintiffs have suffered loss and damage;

(v) that the defendant was already in breach of the SPAs prior to the occurrence of the landslide on 5 November 2017 thus, the landslide does not constitute a force majeure and such occurrence of the landslide is not relevant to the plaintiffs' claim herein;

(vi) that the defendant's was lackadaisical in carrying out the mitigation works;

(vii) that the plaintiffs' action herein was against the defendant's failure to deliver the vacant possession and not against the change of the original layout plan. As a result, cl. 12(4) of the SPAs is not applicable; and

(viii) that the defendant is not entitle to rely on cl. 22(3) of the SPAs as the defendant had failed to comply with cl. 22(1) of the SPAs.

The Defendant's Submissions/Contentions

[60] The defendant's submissions/contentions can be summarised as follows:

(i) that the defendant has completed the development and was in the course of obtaining CCC for the development when the landslide occurred on 5 November 2017;

(ii) that the defendant was prevented by the unforeseen natural disaster from obtaining CCC for the development and delivering vacant possession of the said property to the plaintiffs;

(iii) that the landslide constitutes a *force majeure* or an act of god which is beyond the control of the defendant;

(iv) that the defendant did not abandon the development and had taken active steps to obtained the local authority's approval to reconstruct damaged infrastructure and repair damaged houses;

(v) that pursuant to cl. 12(4) of the SPAs, the plaintiffs are precluded from claiming any damages or compensation against the defendant; and

(vi) that pursuant to cl. 22(3) of the SPAs, the plaintiffs' purported cause of action for liquidated damages has not arisen.

[61] Notwithstanding the issues above, as highlighted earlier, it can be discerned that the crux of this entire case was the issue of whether the plaintiffs are entitled to specific performance or damages *in lieu* of specific performance.

[62] The determination of this issue will in my view determine and substantially dispose this matter.

Issue No. 1: Did The Defendant Abandoned The Project And Are The Plaintiffs Entitled To Specific Performance Of The SPAs Or Damages *In Lieu* Thereof?

[63] It is the crux of the plaintiffs' case that the defendant has breached the terms of the SPAs in failing to give vacant possession to the plaintiffs in the manner stipulated under cl. 23 of the SPAs and that the defendant is unable to provide a definite time period or date as to when the vacant possession can be given to the plaintiffs.

[64] The plaintiffs in their written submission rely on s. 18 of the Specific Relief Act 1950 as well as decided cases such as *Balbeer Singh Karam Singh & Ors v. Sentul Raya Sdn Bhd* [2014] 7 CLJ 461 and *Million Westlink Sdn Bhd & Anor v. Maybank Investment Bank Bhd & Ors And Other Appeals* [2018] 3 CLJ 315 to support the contention that s. 18 of the Specific Relief Act 1950 permits the court to order compensation for breach of contract in addition to or in substitution to the plaintiffs seeking specific performance.

[65] The plaintiffs also relies on the decision of George Varughese JC in the case of *Albert Lim Kok Heng & Anor v. Taman Ratu Sdn Bhd* in Suit No. PA-22NCVC-161-07-2019 (involving the same defendant and facts in this action) to support the contention that this court is not precluded from awarding damages *in lieu* of specific performance notwithstanding that the court is unable to order specific performance. However, the plaintiffs now cannot place any reliance on the decision of the High court as the Court of Appeal has since overturned the same and has held otherwise.

[66] The defendant, on the other hand, contends that it had completed the project on 5 April 2017 as the architect had certified that the defendant had completed the construction of the said properties including all the

infrastructure works in relation to the said development as listed as Stages 2(a) - (h) of the Third Schedule of the SPAs as confirmed by SP1 during cross-examination as follows:

> LHS: Now, can I refer you to ... Before I leave that, just a general question. So, would you agree with me that once the Architect certified the stage of completion 2(a) to 2(h), that basically means that your unit together with all the infrastructure work in relation to this development has been completed?
>
> LAU: Yes.
>
> LHS: Miss Lau, do you accept that based on this certificate issued by the Architect dated 05.04.2017 certifying the completion from 2(a) to 2(h), that means the development has been physically completed as of 05.04.2017?
>
> LAU: Yes.
>
> [See page 10 of the Notes of Proceedings dated 11th January 2023]

[67] The defendant contends that it had yet to deliver vacant possession of the said properties to the plaintiffs as the application for CCC was still pending at the material time on 5 April 2017.

[68] The defendant further submits that the landslide which occurred on 5 November 2017 which is widely reported constitutes a *force majeure* or an act of God which is beyond the control of the defendant. (See the Federal Court case of *Kwan Sun Ming v. Chak Chee Hing* [1964] CLJU 70; [1964] 1 LNS 70; [1965] 1 MLJ 236).

[69] SD2 in his report dated 8 November 2017 explained that the infrastructure was destroyed by the excessive rainfall and landslide which occurred on that fateful day on 5 November 2017.

[70] Due to the said landslides, the defendant now has to construct an elevated driveway pursuant to Stages 3 and 4 of the mitigation works plan to replace the earth retaining wall and road and drainage which were destroyed by the landslide without which, CCC cannot be obtained and vacant possession of the completed properties cannot be delivered to the plaintiffs.

[71] As such, the defendant contends that the only part of the SPAs that has yet to be performed by the defendant was the re-construction of the infrastructure works under cl. 16 of the SPAs, specifically Stages 3 and 4 of the mitigation works plan which are necessary for the obtaining of the CCC.

[72] Further, I have noted that the defendant is not permitted to commence Stages 3 and 4 of the mitigation works until the mitigation works planning permission has been approved as Stages 3 and 4 of the mitigation works plan

involved variation to the original layout plan/planning permission of the said development granted by MBPP as reflected at para. 5(iv) of MBPP letter dated 24 September 2018.

[73] The fact that the defendant had to apply to MBPP to vary the planning permission because of the landslide is well within the knowledge of the plaintiffs as confirmed by SP1 during cross-examination as follows:

> YA: Not so much, forget the variation works. Are you aware, that there is a need to apply for variation of the planning permission first. Forget about what the variation was. Are you aware that the defendant had to apply to the Majlis Bandaraya to vary the planning permission because of the landslides. Are you aware of that fact?
>
> LAU: Yes.
>
> [See page 18 of the Notes of Proceedings dated 11th January 2023]

[74] In this regard, as seen earlier, the defendant has since 1 March 2023 obtained the planning approval and approval for commencement of earth work from MBPP to carry out Stages 3 and 4 of the mitigation works plan.

[75] From the above chronology of events, I certainly am unable to conclude that the defendants can be accused of abandoning the said project. On the contrary, in my view, the defendant did not abandon the said project after the occurrence of the landslide but has indeed taken all necessary steps to carry on the mitigation works to complete the project and to abide by the obligations under the SPAs and to endeavour to deliver vacant possession to the plaintiffs in due course. This too was the conclusion by George Varughese JC in the *Albert Lim*'s case where he opined that it was not a situation of the defendant refusing to perform the contract but rather a case of being prevented from doing so.

[76] Further, as pointed out by learned counsel for the defendant, there is no certificate issued nor publication of Gazette by the Minister of Housing and Local Government which certifies that the licensed housing developer has abandoned the housing development pursuant to s. 11(ca) of the Housing Development (Control and Licensing) Act 1966.

[77] As such, I am of the considered view that having taken into account the facts and circumstances of the case, it cannot be said that the defendant has abandoned the said project or will be unable to deliver vacant possession of the said properties to the plaintiffs. All reasonable actions and precautions have been taken to mitigate and solve the issues caused by the landslide.

[78] Further, having taken into account the facts of the case, I find favour in the defendant's contention that there is no basis for the plaintiffs' claim for specific performance of the SPAs. In any event, as found by George

Varughese JC and as confirmed by the Court of Appeal, it is trite law that the court will not order specific performance where the performance of which will contravene the law as in this case.

[79] As such, I now move on to the next pivotal issue of whether or not the plaintiffs are then entitled to damages *in lieu* of specific performance.

Whether The Plaintiffs Are Entitled To Damages In Lieu Of Specific Performance Of The SPA(s)?

[80] At the outset, if the Court of Appeal had upheld or affirmed the decision of George Varughese JC in Suit No. 161, I would certainly be bound by the same and likewise would make an order of damages *in lieu* of specific performance *albeit* in different amounts.

[81] However, the decision of the Court of Appeal certainly appears to support the defendant's contention that once it is determined that specific performance is not an available remedy, then damages *in lieu* thereof cannot be awarded. It therefore appears that it is a precondition for an order of damages *in lieu* of specific performance that specific performance is an available remedy in the first place. In other words, where specific performance is available, it is up to the court to decide whether or not it ought to grant specific performance or exercise its discretion to grant damages *in lieu* of specific performance. On the contrary, if specific performance is not available, then, damages cannot be awarded *in lieu* thereof.

[82] To support its contention, in addition to relying on the Court of Appeal decision in *Albert Lim*'s case, the defendant also relied on the case of *Lavery v. Pursell* [1888] 39 Ch D 508 where Chitty J at p. 519 of the report in dismissing the claim enunciated as follows:

> ... in this case when the writ was issued *it was impossible to give specific performance*. It was suggested that after Lord Cairns' Act the court of Equity could give *damages in lieu of specific performance. Yes, but it must be in a case where specific performance could have been given. It was a substitute for specific performance. It did not give the old court of Chancery a general jurisdiction to give damages whenever it thought fit*, it was only in that kind of case where specific performance would have been the right decree and there were reasons why it would be better to substitute damages, *but that could not apply to a case where you could not have given specific performance*.
>
> ...
>
> In this case it is quite plain that the 11th January was the extreme day on which Mr. Lavery, the purchaser, could have remained on the property for the purpose of pulling down and removing.
>
> ...

It would have been impossible to grant specific performance in this case, and that being so, it appears to me that the plaintiff cannot recover any damages.

(emphasis added)

[83] Further, in the case of *Bosaid v. Andry* [1963] VLR 465, Scholl J from the Supreme Court of New Zealand at p. 484 of the judgment enunciated as follows:

... It was clearly established that the plaintiff, *in order to recover such damages from the Court of Chancery, must show that he had a right to specific performance at the hearing, or at least that he had such a right save for the existence of a ground entitling the court in its discretion to refuse the equitable remedy. He could not get damages under the Act if the evidence showed that he had no right at all to specific performance ...*

It is true that damages given under statutory power in substitution of specific performance cannot be given in a case where the grant of specific performance is impossible: *Lavery v. Pursell* [1888] 39 Ch D 508; but the position is otherwise when the refusal of specific performance is based upon a discretionary ground, such as hardship.

(emphasis added)

[84] As such, based on the abovementioned case, the defendant submits that the plaintiffs' claim for specific performance or alternatively damages in substitution of specific performance under paras. 11(1) and (2) of the statement of claim are unsustainable in law.

[85] In my view, having noted the above and especially that the Court of Appeal has allowed the defendant's appeal in *Albert Lim*'s case in Suit No. 161 of which its facts are on all fours with the current and has clearly held that the plaintiff is not entitled to damages *in lieu* of specific performance since they have no legal right to specific performance in the first place, I am constrained by the doctrine of stare decisis to follow the said decision of the Court of Appeal and to similarly dismiss the plaintiffs' claim herein for specific performance as well as the alternative remedy of damages *in lieu* of specific performance.

[86] Further, it is to be noted that leave to appeal was filed before the Federal Court *vide* Civil Application No. 08(f)-349-10/2023(P) against the Court of Appeal decision and learned counsel for the plaintiffs herein submitted there that the SPAs were capable of specific performance at the discretion of the court pursuant to s. 18(5) of the Specific Relief Act 1950 and that specific performance could be granted subject to conditions without violating any applicable statutory provisions. (See "*The Law of Specific Relief* by Dr SC Banerjee, 8th Edition and the Indian case of *Pasumarti Ramulu v. Nuthi Anantha Ramulu* 1963 Indlaw, AIR 1966 AP 70].

[87] However, it is to be noted that on 19 February 2024, the Federal Court dismissed the plaintiffs' application for leave to appeal against the Court of Appeal decision of 2 October 2023 which set aside the High Court decision of 11 August 2021.

[88] As such, based on the abovementioned facts and in light of the dismissal of the leave application to appeal to the Federal Court which includes the determination of specific performance as well as the alternative award of damages *in lieu* of specific performance, I am once again constrained to find that the plaintiffs' claim for specific performance and its alternative remedy of damages *in lieu* of specific performance unsustainable and unmeritorious.

[89] Similarly, I find the contention that the SPAs were capable of specific performance at the discretion of the court pursuant to s. 18(5) of the Specific Reliefs Act 1950 and that specific performance could be granted subject to conditions without violating any applicable statutory provisions is bereft of merits in light of the decision of the appellate courts above.

Issue No. 2: Is The Plaintiff Entitled To A Declaration That They Are Entitled To LAD?

[90] There is no disputing that pursuant to the SPAs, the plaintiff would be entitled to make a claim for LAD pursuant to cl. 22 of the SPAs which reads as follows:

> 22(1) Vacant possession of the said Building shall be delivered to the Purchaser in the manner stipulated in clause 23 within twenty-four (24) calendar months from the date of this agreement.
>
> (2) If the Vendor fails to deliver vacant possession of the said Building in the manner stipulated in clause 23 within the time stipulated in subclause (1), the Vendor shall be liable to pay to the Purchaser liquidated damages calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price from the expiry date of the delivery of vacant possession in subclause (1) until the date the Purchaser takes vacant possession of the said Building. **Such liquidated damages shall be paid by the Vendor to the Purchaser immediately upon the date the Purchaser takes vacant possession of the said Building**.
>
> (3) "For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause **shall accrue on the date the Purchaser takes vacant possession of the said Building**".
>
> (emphasis added)

[91] As such, based on the express words in cl. 22(3) of the SPAs, it is clear that the plaintiffs' entitlement to liquidated damages does not accrue until the date of the delivery of vacant possession of the said properties which has yet to be given in this present case. In this regard and in any event, the defendant pleads and submits that the plaintiffs' claim for LAD is premature and only accrues once vacant possession is given. I agree.

[92] As highlighted earlier, Stages 3 and 4 of the mitigation works are underway and the plaintiffs may thereafter proceed to commence any proceedings for LAD once vacant possession is given pursuant to cl. 22 of the SPA above.

[93] In my view, being bound by the recent Court of Appeal decision in Suit No. 161 and having concluded that the plaintiffs' claim for specific performance and damages *in lieu* therefore ought to be dismissed, I see no necessity to make any declaration relating to LAD as sought especially since such claim was withdrawn.

[94] In a similar vein, I see no necessity to make any ruling on whether the landslide amounts to *force majeure etc*, as that issue would be one that the defendant may at the appropriate time subsequently ventilate and rely on to defend any future possible claims for LAD by the plaintiffs.

[95] In any event, whether the defendant is in the midst of applying CCC or not makes no difference in the present case as that ought to be ventilated in any claim for LAD.

Conclusion

[96] In the upshot, I would dismiss the plaintiffs' claim in both Suit Nos. 8 and 9.

[97] As for costs, in light of the peculiar facts of this case and bearing in mind that the plaintiffs have done nothing wrong and have had to endure such a long wait for their properties through no fault of theirs and also bearing in mind that these suits were commenced on the strength of the pronouncements of George Varughese JC in *Albert Lim*'s case, I find that total costs of RM10,000 would a fair and reasonable sum to award to the defendant in Suit Nos. 8 and 9.